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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 12 2010

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained; the petition will be approved.

The petitioner is [redacted] It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the job did not require a master's degree.

On appeal, counsel asserts that the director failed to recognize that the labor certification requires attainment of an advanced degree or the equivalent, and further requires that any equivalent must be a foreign equivalent degree or the required bachelor's degree followed by five years of experience. For the reasons discussed below, while the citation to the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) on the labor certification application creates unnecessary ambiguity, we are persuaded that the job requires an advanced degree professional.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The beneficiary possesses a foreign bachelor's degree and a U.S. master's of science and a master's of business administration. The director did not contest that the beneficiary qualifies as an advanced degree alien or that the beneficiary meets the job requirements set forth on the labor certification. The only issue in contention is whether the job requires an advanced degree alien.

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

DOL has issued regulations that expand on this authority. 20 C.F.R. § 656. It is significant, however, that none of the above inquiries assigned to DOL involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts.

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The regulation at 8 C.F.R. § 204.5(k)(4) provides that the "job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability." The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months

or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: Master's degree*

Experience: 3 years in job offered or in the related occupation of software development**

Block 15: * Will accept educational equivalency evaluation prepared by a qualified evaluation service or in accordance with 8 CFR § 214.2(h)(4)(iii)(D).

** must include professional software development experience reflecting demonstrable ability in the skills set described above.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) provides:

Equivalence to completion of a college degree. For purposes of paragraph (h)(4)(iii)(C)(*4*) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

(*1*) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(*2*) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(*3*) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(*4*) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant

certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(*5*) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(*i*) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(*ii*) Membership in a recognized foreign or United States association or society in the specialty occupation;

(*iii*) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(*iv*) Licensure or registration to practice the specialty occupation in a foreign country; or

(*v*) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

As can be seen from the language quoted above, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) permits several alternatives to a U.S. master's degree or a foreign equivalent degree. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, legacy Immigration and Naturalization Service (legacy INS) now Citizenship and Immigration Services (USCIS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of

the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the job requirements relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to consider that the job requires experience and education equating to an advanced degree under section 203(b)(2) of the Act, the job must require a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Thus, in order to determine that the job requires the experience and education equating to an advanced degree under section 203(b)(2) of the Act, the labor certification must require a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Noting the language following the single asterisk, the director concluded that the labor certification allowed for less than a bachelor's degree plus five years of progressive experience in the specialty or a master's degree. While we understand the director's concern given the express language in 8 C.F.R. § 214.2(h)(4)(iii)(D) that allows for less than a bachelor's degree, subparagraph (5) of that provision also states: "For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty." Significantly, the asterisks that reference the regulation 8 C.F.R. § 214.2(h)(4)(iii)(D) follow both the bachelor's and Master's degree requirements. Thus, while the citation to this provision unnecessarily complicated the evaluation of the job requirements, we are persuaded by counsel's assertion on appeal that the reference to the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) "is relevant to the issue of whether the alien possesses the requisite advanced degree, and not to the threshold issue of the requirements for the position."

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.